Supreme Court, U.S.
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No. 96 484

In The

Supreme Court of the United States

October Term, 1995

JOHN L. CHEEK,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTION PRESENTED FOR REVIEW

At the underlying arbitration, the undisputed material facts showed that petitioner was fired during his vacation, showed that the discharging officer knew petitioner was on vacation, showed that the American Airlines/Allied Pilot Association collective bargaining Agreement did not require or allow a pilot to fly during his vacation, and showed that the only reason petitioner was fired was because he was allegedly not available for work. The undisputed material facts also showed that the discharging officer did not rescind the firing when petitioner met with the discharging officer after the effective date of the firing and still during petitioner's vacation.

The question presented is was the arbitration interpreting and applying the AA/APA collective bargaining Agreement when it upheld the firing of petitioner during his vacation for not being available for work with a majority decision in direct contradiction of Section 21.B.3. of the American Airlines/Allied Pilots Association Agreement.

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PETITION FOR WRIT OF CERTIORARI

Petitioner John L. Cheek respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, entered on June 26, 1996.

OPINION OF THE COURT BELOW

The arbitrator issued an opinion on July 12, 1993. After several executive sessions, the arbitrator issued a second opinion on May 12, 1994. Mr. Hill and Mr. Sewell issued a dissenting opinion on August 30, 1994.

The District Court issued its opinion on March 13, 1995.

The opinion of the United States Court of Appeals for the Seventh Circuit was issued as an unpublished order on June 26, 1996. It is *Appendix A* to this Petition.

JURISDICTIONAL STATEMENT

The June 26, 1996 judgment of the United States Court of Appeals for the Seventh Circuit (*Appendix A*) affirmed the firing of petitioner Cheek during his vacation for allegedly not being available for work. This Court's jurisdiction rests upon 28 U.S.C. Sec. 1254.

STATUTE

45 U.S.C. Sec. 153, First (q) provides in pertinent part:

> If any employee . . . is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award . . . such employee . . . may file in any United States district court . . . The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding . . . the order of the division may be set aside . . . for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

STATEMENT OF THE CASE

Pursuant to 28 U.S.C. Sec. 1331, the District Court had federal jurisdiction of Plaintiff's action under the Railway Labor Act, 45 U.S.C. Sec. 153, First (q), 184, seeking review and vacation of an arbitration award rendered pursuant to the Railway Labor Act.

In 1988 petitioner John Cheek, a pilot for American Airlines since 1973 and former tax protester, was convicted of ten tax crimes for tax years 1980-1986. When petitioner notified his supervisor that he had been sentenced to a year and day, he was removed from his next

trip. After filing a notice of appeal and informing his supervisor, petitioner was reinstated with back pay for the trip he had not flown. He continued to fly for American, and his conviction was reversed by this Court in 1991.

Petitioner was reconvicted, resentenced to a year and day on March 13, 1992, and granted his requested ten day stay of sentence. Petitioner immediately phoned his supervisor, Capt. Carl Price, and requested a personal leave of absence (PLOA).

Petitioner was on vacation from March 15th through March 31th. He met with Capt. Price on Friday, March 20, 1992. During this meeting Capt. Price informed petitioner that the pilots returning from operation Desert Storm were not sufficient to grant his PLOA and gave him a letter separating his employment relationship with American Airlines effective March 23, 1992 for not being available for work. When petitioner informed Capt. Price that he did not have to surrender until March 24, 1992, Capt. Price had the letter retyped stating March 24, 1992.

On Monday, March 23, 1992 petitioner filed an emergency motion seeking intermittent confinement and a notice of appeal. Judge Zagel granted a stay until March 27, 1992 to see if a statutory basis could be found to grant intermittent confinement.

On March 26, 1992 petitioner delivered a letter containing his notice of appeal and the transcript containing Judge Zagel's comments from the March 23, 1992 emergency motion hearing to the flight administration office of American Airlines. Cheek continued downtown and

learned that his emergency motion had been denied by Judge Zagel for lack of a statutory basis.

On March 27, 1992 Attorney Cynthia Giacchetti filed an emergency motion for a stay pending appeal. This motion was promptly denied, but Judge Zagel granted a stay until April 10, 1992 for Cheek to seek a stay in the appellate court. Petitioner then met with Capt. Price on March 27, 1992 and told Capt. Price that his attorney had obtained a stay until April 10th to seek an additional stay in the appellate court. Capt. Price informed petitioner among other things that he was terminated regardless of whether he was available for work and regardless of whether he was on vacation.

As a result of the Capt. Price meeting, petitioner sought the the advice of Attorney Giacchetti and a pilot's union attorney and then filed a MOTION TO AMEND SURRENDER DATE. This motion was granted on March 31, 1992, Cheek surrendered on April 2, 1992, and petitioner did not seek a stay in the appellate court.

An arbitration hearing was held on April 26 and 27, 1993. During this hearing Capt. Price, the discharging officer, testified that he knew that petitioner was on vacation from March 15th through March 31th, that the American Airlines/Allied Pilots Association collective bargaining Agreement did not require or allow a pilot to fly during his vacation, and that the only reason petitioner was fired was because he was not available for work. Capt. Price also testified that he knew petitioner had obtained a stay until April 10, 1992, but he did not rescind the firing and make it effective April 10, 1992.

American Airlines began furloughing pilots in August of 1993, and petitioner would have been able to get a PLOA at that time. See *Appendix C.* That date was before the Seventh Circuit denied Cheek's criminal appeal on August 23, 1993. *United States v. Cheek,* 3 F.3d 1057 (7th Cir. 1993), cert. denied, 114 S.Ct. 1055 (1994).

REASONS FOR GRANTING THE WRIT

Petitioner John Cheek was fired during his vacation for not being available for work; however, it is impossible to be fired during your vacation for not being available for work. Section 21.B.3. of the American Airlines/Allied Pilots Association Agreement states that "Pilots shall not be required to keep the Company advised of their whereabouts on days off, while on vacation or while on layover." See *Appendix B.* And the Seventh Circuit, the same circuit that had imposed the objectively reasonable standard of willfulness upon petitioner in conflict with all other circuits, upheld the majority arbitration opinion which was a direct contradiction of the collective bargaining Agreement.

In *Cheek v. United States,* 498 U.S. 192 (1991), this Court reversed petitioner's tax conviction by explaining why the essential element of willfulness was based on the subjective standard, but the Court did not answer the question as to whether petitioner's constitutional rights were violated by his prosecution under the objectively reasonable standard. This Court now has an opportunity to restore petitioner's pilot job following his reconviction and subsequent firing during his vacation because Rule

10 asks whether a United States court of appeals has so departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

An arbitrator is confined to interpretation and application of the collective bargaining agreement, and he does not sit to dispense his own brand of industrial justice. *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 597 (1960). And the rule in the Seventh Circuit and the emerging trend among other courts of appeal is that arbitral action contrary to express contractual provisions will not be respected. *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng.*, 889 F.2d 599, 604 (5th Cir. 1989), cert. denied, 498 U.S. 853 (1990); *IBEW, Local 429 v. Toshiba America, Inc.*, 879 F.2d 208, 210-211 (6th Cir. 1989); *Polk Bros. v. Chicago Truck Drivers Union*, 973 F.2d 593, 599 (7th Cir. 1992); *Riceland Foods v. United Broth. of Carpenters*, 737 F.2d 758, 760 (8th Cir. 1984); *Howard P. Foley Co. v. IBEW*, 789 F.2d 1421, 1424 (9th Cir. 1986); *Bruno's, Inc. v. United Food & Com. Wkrs. Intern.*, 858 F.2d 1529, 1531 (11th Cir. 1988). "The arbitrator may not ignore the plain language of the contract". *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

Petitioner won an important victory concerning jury determination of fact in this Court, and it was not this Court's intention that he should be punished for his victory by getting fired during his vacation for allegedly not being available for work. Only this Court can prevent that punishment by enforcing the express contractual

provision and once again bring the Seventh Circuit into conformity with other Circuits and its own law.

CONCLUSION

For the foregoing reasons, petitioner John Cheek respectfully requests this Court to grant this Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit, and to restore petitioner's pilot job with seniority and such further relief for back pay and damage as this Court deems justified.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
Submitted June 25, 1996*

June 26, 1996.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

JOHN L. CHEEK,
Plaintiff-Appellant.

No. 95-1711 v.

AMERICAN AIRLINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 94 C 5763
Marvin E. Aspen
Chief Judge.

ORDER

John Cheek is a former pilot employed by American Airlines, Inc. His employment was terminated by American because he was unavailable for work as a result of a one-year and one-day term of imprisonment arising from a conviction for income tax evasion. Cheek petitioned for reinstatement. Pursuant to the collective bargaining

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* After examination of the briefs and the record, we have concluded that oral argument is unnecessary and the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a); Cir. R. 34(f).

agreement between American and the Allied Pilot's Association ("APA"), the matter went to arbitration under the Railway Labor Act, 45 U.S.C. §§ 151-188. The American Airlines Pilot System Board of Adjustment ("the Board") found that American was justified in discharging Cheek. Thereafter, Cheek filed a *pro se* complaint with the district court seeking to overturn the Board's decision. American and Cheek each filed a motion for summary judgment. The district court granted American's motion, denied Cheek's motion and, accordingly, entered summary judgment in favor of American and against Cheek. This timely appeal follows.

Cheek urges that Board's decision should be overturned because it was not based on an interpretation of the collective bargaining agreement. We disagree. For the reasons stated by the district court in its March 14, 1995 entry, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN L. CHEEK, Plaintiff, v. AMERICAN AIRLINES, INC., Defendant.	)	Case No. 94 C 5763

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Plaintiff John L. Cheek brings this action against defendant American Airlines, seeking to overturn an arbitration award that affirmed his dismissal from American. Presently before the court are American's motion to dismiss, or, in the alternative, for summary judgment, and Cheek's cross-motion for summary judgment. For the reasons set forth below, American's motion for summary judgment is granted, and Cheek's cross-motion for summary judgment is denied.

I. Background

Plaintiff John Cheek was a pilot for defendant American Airlines from 1973 until 1992. He is also a tax protester, convicted of federal income tax evasion in 1987. He was sentenced to jail for one year and one day, but the district court stayed the sentence pending appeal. The Seventh Circuit affirmed, *United States v. Cheek*, 882 F.2d 1263 (7th Cir. 1989), but the Supreme Court reversed,

concluding that the jury had been erroneously instructed on the requisite state of mind for the offense. *See Cheek v. United States*, 498 U.S. 192 (1991). On retrial, Cheek was again convicted on all counts and sentenced to a year and a day in prison. Cheek was ordered to surrender ten days later, on March 24, 1992. Cheek immediately informed American of his surrender date, and sought a personal leave of absence ("PLOA"), to cover the term of his imprisonment. On March 20, 1992. Cheek was informed that his request for a PLOA had been denied, and that he had instead been terminated, effective March 24, 1992, because he would be unavailable to fly while in prison. On March 23, 1992, Cheek asked the district court to substitute a sentence of intermittent confinement for his original sentence, so that he would be able to continue working. The District Court extended Cheek's surrender date to March 27, when it denied the motion. On that date, Cheek requested that his sentence be stayed pending appeal. The District Court denied the motion, but granted Cheek an extension of his surrender date to April 10, 1992 so Cheek could petition the Seventh Circuit for a stay. He did not pursue this option, and instead surrendered on April 2, 1992.[1] Cheek was released to the Salvation Army half-way house in Chicago on September 28,1992, and was released from the half-way house on approximately December 22, 1992. He was not rehired by American.

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[1] The Seventh Circuit affirmed Cheek's conviction on August 23, 1993. *United States v. Cheek*, 3 F.3d 1057 (7th Cir. 1993).

Cheek protested his dismissal and petitioned for reinstatement. Pursuant to the collective bargaining agreement between American and the Allied Pilot's Association ("APA"), which represents Cheek, the matter went to arbitration under the Railway Labor Act, 45 U.S.C. § 151 *et al.* On April 26 and 27, 1993, a five-member arbitration board convened to conduct hearings on Cheek's grievance.[2] On July 12, 1993, Administrator Crable issued a draft with the concurrence of the Company-appointed Board members. The majority found that American was justified in denying Cheek a PLOA and in terminating him, and thus denied Cheek's grievance. Cheek requested that the Board reconsider its decision, but on May 12, 1994, the Board issued its final determination denying Cheek's grievance.[3] Cheek then filed the present action, seeking to have the decision vacated pursuant to 45 U.S.C. § 153 First (q).

II. Discussion

The scope of judicial review of Board decisions under the Railway Labor Act ("RLA") is "among the narrowest known to the law." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 91 (1978). Indeed, there are only three grounds on which this court may overturn the Board's ruling:

> (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act;

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[2] The Board consisted of two members appointed by the APA, two appointed by American, and a mutually-selected third-party Chairman, Stephen Crable.

[3] The two APA-appointed members issued a dissent on August 30, 1994.

> (2) failure of the Adjustment Board to conform, or confine itself, to matters within the scope of its jurisdiction; and (3) fraud or corruption.

Sheehan, 439 U.S. at 93 (citing 45 U.S.C. § 153 First (q)). Cheek relies on the second of these alternatives, asserting that the Board exceeded its jurisdiction. However, a court may overturn the Board's decision as outside the scope of the its jurisdiction only when that decision "does not draw its essence from the collective bargaining agreement," *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), or when the Board's interpretation of the contract is "wholly baseless and completely without reason." *Gunther v. San Diego & Arizona E. Ry.*, 382 U.S. 257, 261 (1965). In *United Paperworks Int'l Union v. Misco*, 484 U.S. 29 (1987), the Supreme Court elaborated on this standard in considering judicial review of arbitration awards generally:

> Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. . . . [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Id. at 38.

In the present case, the Board faced two issues: whether Cheek should have been granted a PLOA in March, 1992, and whether the Company acted properly in terminating him in light of his pending imprisonment. With respect to the first issue, the Board clearly did not

exceed is jurisdiction. Section 19A of the collective bargaining agreement between the parties allows for leaves of absence "[w]hen the requirements of the Company will permit. . . . " The Board noted that, due to pilot shortages, the Company did to grant any PLOAs in March, 1992, and concluded that the American's requirements would not have permitted a PLOA for Cheek. Accordingly, the Board ruled that the Company acted properly in denying Cheek's request. Aside from minor factual disputes, which are not properly before us, *see Misco*, 484 U.S. at 38, Cheek does not take issue with this finding.

Instead, the focus of Cheek's complaint is that American acted improperly in terminating him, and that the Board's ruling affirming that decision was "without foundation in reason or fact," another means of stating that the Board acted outside the scope of its authority. *See, e.g., Brotherhood of R.R. Trainmen v. Central of Ga. Ry. Co.*, 415 F.2d 403, 411-12 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970). Cheek essentially argues that he was technically on vacation in March, 1992, and was therefore not scheduled to fly until April 6. As a result, he maintains that he was not "unavailable" when he was notified of his termination, notwithstanding the fact that he himself informed American that he had been convicted and was facing a term of incarceration. He adds that he was able to obtain extensions of his surrender date to April 10, so that he was not "unavailable" on the effective date of his termination either. Again, however, the relevant inquiry at this stage is not whether we *agree* with the Board's interpretation of the collective bargaining agreement and the relationship between the parties, it is whether the Board's decision had a *basis* in that agreement and relationship.

See, e.g., Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192, 1195 (7th Cir. 1987) ("[T]he question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract.").

The parties do not dispute that extended unavailability for work constitutes just cause for termination. The only issue presented in this action, then, is whether Cheek's *prospective* extended unavailability for work was sufficient to justify termination. However, the answer to that question depends upon the interpretation of the parties' agreement, which in turn is left to the arbitrators. The Board ruled, in relevant part:

> [T]he Company terminated the Grievant because of his imminent, extended imprisonment, not his unavailability on a particular day. Although the Company made his termination effective on March 24, 1992, the gravament of the charges against Grievant centered on his extended absence from work because of his incarceration. Although the day of his ultimate incarceration was delayed by a few weeks, the fact of his imprisonment did not change. Grievant was unavailable for work from April-September, the very conduct which caused the Company to terminate him.

It is apparent from this discussion that the Board simply determined that "unavailability" included "imminent" unavailability, as well as present unavailability. Whether this is the proper interpretation is not for us to decide, for

all that matters is that it is clearly an interpretation of the parties' agreement. *See, e.g., Hill,* 814 F.2d at 1195-97 (arbitrators were interpreting agreement in concluding that grievant who pled guilty, but against whom charges were subsequently dismissed and no judgment of conviction was entered had been "convicted" within the meaning of the agreement). While Cheek clearly does not agree with the Board's interpretation, the very fact that the Board interpreted the agreement dooms Cheek's lawsuit.

Cheek, however, makes two additional arguments which he maintains warrant overturning the Board's decision. First, he asserts that American introduced irrelevant and prejudicial information at his arbitration hearing (*i.e.,* evidence surrounding his conviction and imprisonment), thereby tainting the proceedings. We initially question Cheek's assertion that this evidence was "irrelevant," since it went both to the reason for his unavailability and to issues of mitigation in determining the appropriateness of the termination. In any event, we observe that this is not an adequate ground for overturning the Board's decision, and therefore reject Cheek's argument. *Cf. Levy v. Shearson, Lehman Hutton, Inc.,* 826 F.Supp. 784, 785 (S.D.N.Y. 1993) (introduction into evidence of "avalance" [sic] of prejudicial and irrelevant information not ground for overturning arbitrator's award). Cheek also argues that the Board failed "to follow case precedence," in that another American pilot/tax protester was suspended (rather than terminated) under similar circumstances (the *Urbanski* decision). We reject this argument for several reasons. First, "traditional judicial principles of stare decisis and res judicata are given significantly less weight in arbitration proceedings." *Gen.*

Comm. of Adjustment, United Transp. Union v. CSX R.R. Corp., 893 F.2d 584, 593 n.10 (3rd Cir. 1990); *see also Wyman-Gordon Co. v. United Steelworkers of Am.*, 613 F.Supp. 626, 629 (N.D. Ill. 1985) (collecting cases). Second, the Board effectively distinguished *Urbanski*, ruling that there was no persuasive evidence of mitigation in Cheek's case. As a result, even if prior arbitrations were entitled to precedential effect, the factual differences between the two cases justify the different results. Finally, as with Cheek's other arguments, this objection does not provide a basis for overturning the Board's decision, since it does not alter the fact that the Board acted within its jurisdiction by merely interpreting the parties' agreement.

III. Conclusion

For the reasons set forth above, defendant American Airlines, Inc.'s motion for summary judgment is granted, and plaintiff John L. Cheek's motion for summary judgment is denied. It is so ordered.

/s/ Marvin E. Aspen
MARVIN E. ASPEN
United States
District Judge

Dated 3-13-95

APPENDIX B

b. The Company shall make available projected crew assignments on all regularly scheduled trips not less than five (5) days in advance of the departure of such trips, except when prevented by circumstances beyond the control of the Company. In any event all pilots shall be furnished with adequate notification of the departure time of their trips. A pilot on a regularly scheduled sequence of trips shall not be removed from such sequence except in cases of irregularity of scheduled operations or unforeseen contingencies which necessitate such removal.

3. Pilots shall not be required to keep the Company advised of their whereabouts on days off, while on vacation or while on layover.

4. It shall be the responsibility of pilots who are unable to report for duty to notify, as far in advance as possible, the controlling Chief Pilot or a designated representative of this fact, giving the reason for their inability to report for duty.

5. This Agreement contemplates that pilots shall devote their entire professional flying service to the Company, except that nothing in this Agreement shall be construed to prevent any pilot from affiliating with the military service of the United States.

APPENDIX C

Allied Pilots Association

September 20, 1994

John Cheek
795 Wellington Ave.
Elk Grove Village, IL 60007

Dear Captain Cheek:

As to the telephone request this morning, I am authorized to provide you the following information:

(1) As of August 1993, American Airlines began furloughing pilots.

(2) As of this date, we have over 500 furloughed pilots.

If I may be of further assistance, please give me a call at 1-800-323-1470, ext. 255.

Sincerely,

/s/ Stacy Line
Stacy Line
Membership Secretary

p.o. box 5524 – arlington, texas 76005-5524 – 214-988-3188